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12 Google Inc.

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION
16

17 KINDERSTART.COM, LLC, a California
18 limited liability company, on behalf of itself and
all others similarly situated,

19 Plaintiffs,

20 v.

21 GOOGLE INC., a Delaware corporation,

22 Defendant.
23
24
25

CASE NO.: C 06-2057 JF (RS)

**DEFENDANT GOOGLE INC.'S
MISCELLANEOUS
ADMINISTRATIVE REQUEST
UNDER L.R. 7-11 TO CONTINUE
OR VACATE PRELIMINARY
INJUNCTION HEARING DATE**

INTRODUCTION

After close of business on the Friday before the Memorial Day weekend, *fourteen months* after the alleged conduct and harm about which it complains, Plaintiff Kinderstart.com LLC (“Kinderstart”) filed a Motion for Preliminary Injunction. The motion is frivolous. Rather than demonstrating anything close to irreparable harm or substantive merit, Kinderstart’s forty-eight page brief is just another effort by Kinderstart to attack defendant Google, Inc.’s (“Google”) exercise of First Amendment rights.

Well before Kinderstart filed its motion, Google had challenged Kinderstart’s entire case with both a Motion to Dismiss and an Anti-SLAPP motion. Google set these two potentially dispositive motions for hearing on June 30, 2006, the same date Kinderstart belatedly chose. Indeed, Kinderstart filed its Preliminary Injunction Motion on the shortest possible briefing schedule for a June 30, 2006 hearing. Google’s two prior-filed motions address the exact same issue on which Kinderstart seeks injunctive relief: whether in formulating the search results for its well known search engine, Google, a private party and non-state actor, can be held liable for alleged violation of Kinderstart’s free speech rights under the First Amendment or California Constitution. Google’s Motion to Dismiss demonstrates that Kinderstart cannot state *any* claim against Google based on Google’s decision not to include Kinderstart’s Internet site in certain search results. Google’s Anti-SLAPP Motion demonstrates that Kinderstart’s free speech claims against Google turn the First Amendment on its head and improperly seek to hold Google liable for the exercise of *Google’s* speech rights.

Kinderstart’s delay of more than a year in seeking a preliminary injunction demonstrates that there is no urgency to its request. Its substantially oversized brief violates Local Rule 7-2(b) and will force Google to considerable, unnecessary burden and expense, as Google’s motions may dispose of this case. For these reasons, Google respectfully requests an order striking

1 Kinderstart's oversized brief and continuing or vacating the hearing date on the preliminary
2 injunction motion until *after* Google's dispositive motions on the same issue can be resolved.¹

4 FACTUAL BACKGROUND

5 Kinderstart alleges that starting in *March 2005*, Google removed Kinderstart's Internet
6 site from the search results Google displayed for particular search terms, and that this action
7 caused Kinderstart to lose user traffic and revenue. First Amended Complaint ("FAC"), ¶¶74-
8 77; Motion for Preliminary Injunction at 11 ("One day in March 2005, Defendant Google
9 incredulously determined that KS.com was no longer 'relevant' on the Internet and removed
10 from Google's index."). According to Kinderstart, this issue has persisted ever since. FAC, ¶
11 76. Yet, Kinderstart waited a year to file the present action on March 17, 2006. Then, it chose
12 not to serve its original complaint. Instead, it waited another month to file and serve its First
13 Amended Complaint on April 12, 2006. Then, it waited still another month to file its Motion for
14 Preliminary Injunction, which notably came two weeks after Google filed its potentially
15 dispositive motions challenging Kinderstart's case.

16 Accordingly, fourteen months after the onset of the alleged injury, Kinderstart claims it is
17 somehow suffering irreparable harm and seeks the extraordinary remedy of a preliminary
18 injunction. But it has adduced no evidence in its oversized brief of any new or different alleged
19 harm. Indeed, Kinderstart concedes that nothing has changed. *See* Motion for Preliminary
20 Injunction at 14. ("The burden upon Plaintiff KSC is constant and ongoing because KS.com
21 cannot be found on the Web anymore with basic search terms . . . This isolation has continued
22 for over a year, and it damages the goodwill of Plaintiff KSC.").

23 Google's two motions are scheduled to be heard on June 30, 2006, the same day that
24 Kinderstart has set for the hearing on its Preliminary Injunction Motion. The first is a Motion to
25 Dismiss, in which Google seeks to dismiss all of Kinderstart's nine cause of action. This

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27 ¹ As set forth in the accompanying Declaration of David H. Kramer, the parties have met and
28 conferred with respect to this request, but have been unable to reach a stipulation on the
proposed relief.

1 includes a request to dismiss Kinderstart's first cause of action upon which Kinderstart bases its
 2 request for preliminary injunction: alleged violation of the right of free speech under the First
 3 Amendment and the California Constitution. As Google points out in its Motion to Dismiss,
 4 because Google is not a state actor, it can face no liability for alleged violations of Kinderstart's
 5 right of free speech. *See* Google's Motion to Dismiss at 5-9. Google's second motion is an
 6 Anti-SLAPP motion under Cal. Civ. Proc. Code § 425.16, pursuant to which a defendant may
 7 move to strike from a complaint claims for relief arising from the defendant's exercise of its free
 8 speech rights in connection with a public issue. Google seeks to strike three of Kinderstart's
 9 causes of action, again including Kinderstart's first cause of action for alleged violation of the
 10 right of free speech.

11 ARGUMENT

12 I. Kinderstart's Oversized Brief Should Be Stricken

13 Under Civil Local Rule 7-2(b), motions are required to be "one filed document not
 14 exceeding 25 pages in length." A party must specifically seek leave to file a motion exceeding
 15 this page limit. *See* Local Rule 7-11. Kinderstart filed a forty-eight page brief (as numbered,
 16 which includes tables), without seeking leave of court. For this reason alone, its brief should be
 17 stricken.

18 II. The Preliminary Injunction Hearing Date Should Be Vacated or Continued

19 Kinderstart has demonstrated no urgency for its request for preliminary injunction. To
 20 the contrary, its fourteen-month delay in seeking a preliminary injunction conclusively
 21 demonstrates that there is no urgency (and that the motion is baseless).

22 Since there is no urgency, it makes little sense for Google to undertake the burdensome
 23 process of sifting through Kinderstart's rambling, forty-eight page brief to prepare an opposition
 24 at this point in time. One or both of Google's motions may very well obviate the need for the
 25 Court or Google to spend any time on Kinderstart's Preliminary Injunction Motion. Indeed,
 26 California's anti-SLAPP statute, the basis for one of Google's motions, was enacted "to
 27 encourage continued participation in matters of public significance, and that this participation
 28 should not be chilled through the abuse of the judicial process." Cal. Civ. Proc. Code

1 §425.16(a). The statute therefore authorizes a special motion to strike to minimize the burdens
2 on parties, like Google, who are sued for exercising their right of free speech under the First
3 Amendment or the California Constitution. *Id.* Kinderstart's baseless Motion for Preliminary
4 Injunction, filed at the last possible moment on the eve of a holiday weekend, seems designed to
5 annoy and harass Google precisely for exercising its right of free speech, and is therefore directly
6 at odds with the purpose and intent of the anti-SLAPP statute. At a minimum, the Court should
7 have an opportunity to decide the merits of Google's Anti-SLAPP Motion (and Google's Motion
8 to Dismiss) before the Court or Google need undertake the significant task of dealing with
9 Kinderstart's oversized motion.

10 Accordingly, Google respectfully requests that the Court vacate the June 30, 2006 date
11 for the Preliminary Injunction Hearing, or continue the hearing date until such time as Google's
12 prior-filed motions can be resolved. Having waited this long to bring its motion and having
13 provided no evidence of any supposed new or different harm, Kinderstart is hardly in a position
14 to complain about this more orderly, efficient briefing schedule.

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17 Dated: May 31, 2006

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

18
19 By: /s/ Colleen Bal
Colleen Bal

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21 Attorneys for Defendant
Google Inc.